Appendix "A"

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. International Longshoremen's and Warehousemen's Union, Local 12, Respondent.	No. 20,914

[April 18, 1967]

On Petition to Enforce an Order of the National Labor Relations Board

Before: Chambers and Hamley, Circuit Judges, and Byrne, District Judge

Hamley, Circuit Judge:

The National Labor Relations Board (Board) petitions for enforcement of its order of November 18, 1965, issued against respondent, International Longshoremen's and Warehousemen's Union, Local 12. The Board decision and order is reported at 155 N.L.R.B. No. 89.

The Board's regional director alleged in his complaint that Local 12 had engaged in unfair labor practices in violation of section 8(b)(1)(A) and 8

(b)(2) of the National Labor Relations Act (Act), 49 Stat. 452, as amended, 29 U.S.C. § 158(b)(1)(A) and (2) (1964). Local 12 had violated these statutes, it was alleged, by failing to dispatch Donald Wilson, Bernard Warnken and Lee Thomas, the charging parties, from the dispatch hall, and by excluding them from the dispatch hall. The trial examiner entered findings and conclusions upholding the charges and upon agency review, the Board adhered to the trial examiner's findings and conclusions.[1]

The Board order requires Local 12, together with its officers and agents, to cease and desist from the specified unfair labor practices. It also requires them to make Wilson, Warnken and Thomas whole for loss of pay suffered by reason of such practices. In addition, the order contains the usual provisions concerning the posting of notices and the giving of notifications.

Wilson, Warnken and Thomas worked out of North Bend-Coos Bay, Oregon, longshoremen's dispatch hall. The hall was established pursuant to a collective bargaining agreement between the International Longshoremen's and Warehousemen's Union (ILWU), of which Local 12 is an affiliate, and an association of employers known as the Pacific Maritime Association (PMA). Under the terms of that agreement, the hall, which offers the only means longshoremen have of obtaining work in that area, is governed

[1]The Board order modifies, in certain respects, the trial examiner's recommended remedy.

by a joint committee of union and employer representatives.

"Under the terms of the agreement, longshoremen registered under the PMA-ILWU contract have first preference of dispatch." A longshoreman who is not so registered is known as a "casual," and may be dispatched for employment if there are no registered longshoremen present, provided he pays his pro rata share of dispatching hall expenses. It is the practice for casual workers seeking employment to telephone for a recorded tape message which indicates whether there is any prospect for employment of casuals on that day. If there is such a prospect, the casuals who telephone may come to the dispatch hall, where available work is assigned out by a dispatcher.

Wilson, Warnken and Thomas were casuals. On August 18, 1964, Wilson complained to William Armstrong, president of Local 12, that the dispatchers were discriminating against them by preferring casuals who were sons of registered longshoremen. These three indicated to Armstrong their intention to picket unless the discrimination was discontinued. Receiving no assurance that the matter would be investigated, they picketed the hall for fifteen minutes on August 19, 1964. They discontinued this when Armstrong assured them that the joint committee would meet with them at 7:30 p.m. on August 21, 1964. The three were present at the time and place set for the meeting, but no meeting was held.

On August 29, 1964, Wilson was put in touch by telephone with W. B. Ferguson, a PMA representa-

tive of the joint committee, who told him to file with that committee a written statement of grievances. Wilson, Warnken and Thomas filed such a statement with the committee later that day. Wilson, Warnken and Thomas made an oral presentation of their grievances before the joint committee on September 2, 1964. The committee then agreed to take the matter under consideration and the three casuals stated that they would abide by the committee's decision. No action having been taken by September 26, 1964, Wilson, Warnken and Thomas wrote to Ferguson complaining that the situation at the dispatch hall was much worse. Ferguson wrote back, assuring these men that the committee was investigating the grievances, and urging them to postpone ". . . any unnecessary drastic action until our efforts have been expended. . . ."

On October 5, 6 and 7, there were many ships in the bay and every casual working out of the dispatch hall was hired except Wilson, Warnken and Thomas. Rather than dispatch these three casuals, the dispatchers recruited men from taverns and from a nearby Air Force base to serve the ships then in the bay.

On October 8, 1964, Thomas and Warnken were at the hall. Armstrong who was at the hall that day, testified that these men told other casuals who were present, "Go on up to the window; there's plenty of work." They were referring to the small window through which a prospective casual could talk to a dispatcher. This was contrary to the dispatcher's

practice of lining up casuals who were at the hall to select those needed for available jobs, rather than to dispatch casuals one at a time through the window.

Joe Jakovac, the relief dispatcher who was then on duty, did not know exactly what Thomas and Warnken were then doing, but testified that he knew that for several days they had been walking around the hall talking to others and trying to start a strike against the hiring procedures. On October 8, 1964, believing that Thomas and Warnken were disrupting established dispatch hall practices, Jakovac stopped the hiring and in the presence of Armstrong, president of Local 12, told them to leave the hall. As they started to leave they met Wilson and told him what Jakovac had said. All three then left. Later the same day, Thomas returned to the hall to talk to Jakovac, but Jakovac told him to ". . . get out and stay out."

Local 12 claimed in the Board proceeding that this eviction was intended to be for that day only. The trial examiner found, however, that in view of the entire context of events, including Jakovac's last statement to Thomas, the eviction was not intended for just one day. The trial examiner also found that Wilson was correct in assuming that he was included in the eviction although Jakovac did not speak directly to him.

The three casuals advised Ferguson of their expulsion from the dispatch hall. Ferguson requested that they take no further action until they heard from him on October 13, 1964. Not having heard from him by that date, Wilson, Warnken and Thomas resumed

picketing the dispatch hall the next day and continued to do so until the unfair labor practice charge was filed on October 20, 1964.

The charges came to the attention of the joint committee at a meeting held on October 21, 1964. At that meeting the employer representatives announced that they would have nothing further to do with the matter. The committee has made no disposition of the grievance.

On or about November 13, 1964, a Board representative advised the three casuals to return to the hall and attempt to obtain dispatch to employment. This they did without success.[2]

Based on findings to this general effect, the trial examiner further found that Local 12 discriminated against Wilson, Warnken and Thomas, by refusing to dispatch them when work was available, and by excluding them from the dispatch hall. The reason for such discrimination, the trial examiner found, was to effectuate reprisal for the concerted activities in which these three had engaged. These activities consisted of their concerted protest against Local 12's method of operating the dispatch hall, manifested by picketing the hall, filing a grievance with the joint committee, and making a personal appeal to other

[2]Wilson continued reporting to the hiring hall for about fifty days without securing employment. He obtained other employment on February 16, 1965. Warnken regularly went to the hiring hall between November 13, 1964 and March 23, 1965, the date of the hearing in this matter, without being dispatched. Thomas regularly went to the hall between November 13, 1964 and December 4 or 5, 1964, without being dispatched.

casuals present at the dispatch hall on several occasions.

The trial examiner concluded that by reason of the discrimination practiced against these three casuals, Local 12 had committed an unfair labor practice within the meaning of section 8(b)(2) of the Act, by causing or attempting to cause employers to encourage membership in a labor organization in violation of section 8(a)(3) of the Act, 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(3) (1964). Such encouragement, the trial examiner concluded, resulted when the three employees were made aware, through union-motivated discriminatory practices, that they could not expect employment unless they became members of the union and remained in good standing. The trial examiner also concluded that Local 12 committed an unfair labor practice within the meaning of section 8(b)(1)(A) of the Act, by restraining or coercing these three employees in the exercise of rights guaranteed in section 7 of the Act, 49 Stat. 452, as amended, 29 U.S.C. § 157 (1964), particularly the right to engage in concerted activities for the purpose of mutual aid or protection.

In resisting the petition for enforcement, respondent first contests the trial examiner's holding, adopted by the Board, that Local 12 committed an unfair labor practice under section 8(b)(1)(A), by restraining or coercing Wilson, Warnken and Thomas in the exercise of rights guaranteed in section 7 of the Act.

Respondent argues that there is no showing that Wilson, Warnken and Thomas were restrained or

coerced with respect to any protected activity. The issue raised by this argument is whether this particular finding of the trial examiner is supported by substantial evidence on the record considered as a whole, this being a proper subject of inquiry in a Board enforcement proceeding. See section (10 (c) of the Act, 49 Stat. 453, 29 U.S.C. § 160(c) 1964).[3]

Before these three casuals manifested their protest by picketing, and by filing a grievance with the joint committee, discriminatory hiring practices were limited to preferring of sons of union members over other casuals. Afterwards, Wilson, Warnken and Thomas were not dispatched at all even when, because of the number of ships in the bay, it was necessary to recruit men from taverns and an Air Force base. When these three men, through concerted activity, sought to call the attention of other casuals present in the dispatch hall to the discriminatory practices, they were ordered out of the dispatch hall. While a dispatcher testified that the exclusion was only intended to be for one day, Wilson, Warnken and Thomas were not so advised by the dispatchers, even when they resumed picketing of the dispatch hall.[4]

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[3]In considering that question we are required to apply the rule announced in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, that the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.

[4]Respondent argues that these three casuals made themselves unavailable for employment for work from October 8, 1964, when they were barred from the dispatch hall, until November 13, 1964, when they returned to the hall at the suggestion of the Board representative. However, we agree with the trial examiner that after these men were told to get out of the dispatch hall, it was the respondent's responsibility to notify them that the dispatch hall was open to them before it could claim that these men had made themselves unavailable for dispatch.

While the evidence shows that work dropped off substantially in the last quarter of 1964, it is not contended that there was no work for casuals during that period. Respondent argues (citing *Iron Workers Local 433,* 151 NLRB 1092), that where it is not shown that any union representative exhibited hostility to, or resentment against, persons who were not dispatched, it may not be found that such failure was for the purpose of restraining or coercing protected concerted activity. Without passing upon the question of whether a showing of hostility or resentment is indispensable, we believe that hostility and resentment on the part of the dispatchers were demonstrated here. We also think there was a sufficient showing of a specific discriminatory motivation.

Respondent contends that the conduct of Wilson, Warnken and Thomas in the dispatch hall was not protected activity under section 7, pointing to testimony that they were disrupting the operation of the dispatch hall. If the three casuals were disrupting such operations, they should have been advised to this effect and asked to desist. Instead, without explanation, they were ordered to leave. Under these circumstances, they were entitled to assume that they were being excluded because they sought support for their protest against the hiring practices.

Giving application to the rule of *Universal Camera, supra* note 3, we hold that there is substantial evidence supporting the Board finding that, by reason of the described conduct of the dispatchers, Wilson, Warnken and Thomas were restrained in their pro-

tected and concerted effort to protest the discriminatory hiring practices of the North Bend-Coos Bay dispatch hall.

Respondent next contends that there is no substantial evidence to support the finding of the Board that Local 12 caused employers to discriminate against Wilson, Warnken and Thomas, in violation of section 8(b)(2) of the Act.[5] The trial examiner found, in effect, that such employer discrimination consisted in withholding employment from these three casuals. The effect of such discrimination, the trial examiner could reasonably conclude, was to encourage them to join the union in order to obtain work assignments.

Respondent argues that there is no evidence in this record which shows that Local 12 caused or attempted to cause employers to discriminate against these three casuals in the manner just described. Again applying the *Universal Camera* test, we believe there was ample evidence of this kind. After Wilson, Warnken and Thomas had engaged in concerted activities in protest against the hiring practices, the employer discrimination was caused or attempted to be caused by Local 12 through the simple expedient of not dispatching these men to any of the employers. Respondent is chargeable with knowing that this employer discrimination, which respondent caused, would tend

[5]As noted above, section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employer in violation of section 8(a)(3) of the Act. Section 8(a)(3) prohibits employer discrimination against employees "to encourage or discourage membership in any labor organization: . . ."

to encourage Wilson, Warnken and Thomas to become union members so that the discrimination would cease.

Respondent also argues that any liability which could arise from the two unfair labor practices discussed above, should not attach to Local 12, but to the International Union, which is not a party to these proceedings. The Board, however, adopted the trial examiner's finding which stated that Local 12 could be held liable for the dispatcher's acts on either a joint venture or an agency theory.

We need not decide whether the trial examiner's joint venture theory has application here because, in any event, the agency theory provides an adequate ground for holding Local 12 liable for the acts of the dispatcher. See *N.L.R.B. v. International Longshoremen's and Warehousemen's Union,* 9 Cir., 210 F.2d 581; *N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local 10,* 9 Cir., 283 F.2d 558, note 5.

Moreover, since the examiner also properly found that Local 12 was bound directly by the acts of the dispatchers, it could be held responsible for the dispatcher's conduct regardless of whether an agency relationship existed between International and Local 12.

Respondent contended before the trial examiner that it was not responsible for the unlawful operation of the dispatch hall because the hall was under the immediate control of the joint committee, half of

whose members were employer representatives associated with PMA. The trial examiner concluded, however, that since Local 12 elected the dispatchers[6] and paid for one-half the cost of maintaining the dispatching hall, it was responsible for the acts of dispatchers whom it selected and paid. This conclusion is consistent with this court's opinion in *N.L.R.B. v. I.L.W.U.*, 9 Cir., 210 F.2d 581, 584.

In addition, Armstrong, president of Local 12, was present when Wilson and Warnken were told to leave the dispatch hall and apparently acquiesced therein. Under this circumstance and the other circumstances discussed above, we are of the view that the trial examiner did not err in concluding that Local 12 could be held responsible for the discrimination which occurred.

Local 12 attacks the provision of the Board order which requires the local to make whole Wilson, Warnken and Thomas from October 5, 1964, for any loss of pay suffered by them as a result of the discrimination of Local 12 against them. The Board order provides that such payment shall be equal to the amount of wages they would have earned but for the discrimination practiced against them, computed on the basis of each separate calendar quarter or portion thereof,

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[6]Section 8.21 of the 1961-1966 agreement between PMA and ILWU provides that the personnel for each dispatching hall, with the exception of dispatchers, would be appointed by the joint committee. Dispatchers were to be selected by ILWU through elections. In application of these provisions, however, it was the membership of Local 12 which elected the dispatchers.

together with interest at the rate of six per cent per annum.

Local 12 asserts that this back-pay provision is contrary to the holding in *N.L.R.B. v. Local 2, Etc.*, 2 Cir., 360 F.2d 428. In that case, the court modified a Board back-pay order which did not appear to contemplate an inquiry into the length of time the employer would have kept the charging parties at work.

As we read the order here in issue, it contemplates such an inquiry in the compliance proceeding. Such a compliance proceeding usually commences with the issuance, by a Board official, of a back-pay specification. If the answer thereto filed by the respondent presents an issue of fact, a hearing is held before a trial examiner. Therefore, no modification of the order in this regard is needed.

Finally, respondent argues that the proceeding should be remanded to the Board with directions that it consider whether the picketing by Wilson, Warnken and Thomas, and their submission of demands or requests, were protected activities within the meaning of section 7, in view of the fact that the collective bargaining contract contains a no-strike clause and provisions setting up grievance and arbitration procedures.

The no-strike provision of the collective bargaining agreement has no application in this case because the picketing and other activities of Wilson, Warnken and Thomas did not constitute a strike or work stoppage by employees against one or more employers.

See *N.L.R.B. v. Illinois Bell Telephone Co.*, 7 Cir., 189 F.2d 124, 127; *THE POINT REYES*, 5 Cir., 110 F.2d 608, 609-610; *C. G. Conn, Ltd., v. N.L.R.B.*, 7 Cir., 108 F.2d 390, 397.

The question of the availability of the grievance procedure is not properly before us. Insofar as the record before us indicates, the only objection which respondent made before the agency with reference to whether respondent had restrained or coerced Wilson, Warnken and Thomas in engaging in a protected activity, had to do with their activity within the dispatch hall in seeking to enlist the support of other casuals. As to this particular occurrence, respondent's only contention was that the activity was not protected because it involved a disruption of the dispatch hall—not because alternative grievance procedures were available.

Since the argument which respondent now advances was not the basis of any objection made in the agency proceeding, it is not available to respondent in this court. See section 10(e) of the Act, 49 Stat. 454, 29 U.S.C. § 160(c) (1964); *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 387-388; *N.L.R.B. v. International Ass'n of Machinists, Lodge 942, AFL-CIO*, 9 Cir., 263 F.2d 796, 798.

The petition will be enforced.

As amended by order of May 18, 1967.

Appendix "B"

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. International Longshoremen's and Warehousemen's Union, Local No. 12, Respondent.	No. 20,914

DECREE

Before: Chambers and Hamley, Circuit Judges, and Byrne, District Judge.

This Cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, International Longshoremen's & Warehousemen's Union, Local No. 12, its officers, agents, and representatives, on November 18, 1965. The Court heard argument of respective counsel on December 14, 1966, and has considered the briefs and transcript of record filed in this cause. On April 18, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the United States Court of Appeals for the Ninth Circuit that

International Longshoremen's & Warehousemen's Union, Local No. 12, North Bend-Coos Bay, Oregon, its officers, agents, and representatives shall:

A. Cease and desist from:

(1) Discriminating in the hire and tenure of employment of Donald Wilson, Lee Thomas and Bernard Warnken, by failing and refusing to dispatch them to work by reason of the protected concerted activities engaged in by said individuals.

(2) In any other like manner interfering with, restraining or coercing Donald Wilson, Lee Thomas and Bernard Warnken in the exercise of their rights guaranteed by Section 7 of the Act, except to the extent that such right may be affected by an agreement made in accordance with the provisions of Section 8 (a)(3) of the Act requiring membership in a union as a condition of employment.

B. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act).

(1) Make whole Donald Wilson, Lee Thomas and Bernard Warnken in the manner specified in the portion of the Decision of the Trial Examiner entitled "The remedy" for any loss of pay suffered by them as a result of the discrimination of International Longshoremen's & Warehousemen's Union, Local No. 12 against them.

(2) Notify the Joint Port Labor Relations Committee of North Bend-Coos Bay and the dispatchers

of the hiring hall in that area, and furnish copies of such notices to Wilson, Warnken and Thomas, that Wilson, Warnken and Thomas will have full use of this hiring hall without discrimination in connection with their dispatch to employment.

(3) Notify the above-named individuals if presently serving in the Armed Forces of the United States of their right to full use of this hiring hall without discrimination in connection with their dispatch to employment, upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(4) Upon request make available to the National Labor Relations Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all or any other records necessary for the determination of the amount of backpay due under the terms of this Decree.

(5) Post in conspicuous places in its offices and in the North Bend-Coos Bay hiring hall, including all places where notices to employees or members are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of this notice shall, after being duly signed, be posted immediately upon receipt thereof, and maintained for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced or covered by any other material.

(6) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith. Endorsed, Decree Filed and Entered

/s/ William B. Luck
William B. Luck
Clerk

[A True Copy
Attest:

William B. Luck
Clerk]

Appendix "C"

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . .

* * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided, further, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing . . .

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as well as effectuate the policies of this Act; * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * * and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member,

agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *